

complaint

Mr and Mrs J complain that Bank of Scotland plc (BoS) refused unreasonably to agree to the proposed sale of their property when they were in financial difficulties. They also complain that the bank failed to respond to their correspondence regarding proposed payment plans and that it failed to release them from personal guarantees related to their business as it had said it would.

background

I have detailed the background to this complaint in two provisional decisions that I issued and therefore I will only summarise the background here.

Mr and Mrs J had a residential mortgage with BoS. When they fell into financial difficulties with their business and had problems meeting the contractual monthly payments on the mortgage they put their property on the market at £1.6 million and informed BoS that they were doing so. A sale at this price would have cleared all their outstanding commitments. In 2011, the bank granted them a limited interest only period to help them through the period of difficulty. During this time Mr and Mrs J added a second and third charge to their property in an effort to address their problems.

There were no credible offers to buy the property until early 2012 when they received an offer of £1.2 million which was subject to a 6-7 month option agreement. This meant that the buyer would give Mr and Mrs J a non-refundable option payment while he sought planning permission to demolish the house and rebuild a new property on the land. In return, Mr and Mrs J would take the property off the market for 6-7 months.

Mr and Mrs J requested BoS's agreement to the sale with the option agreement but, after some months, this was declined. BoS didn't give a reason for the decline at the time. Mr and Mrs J wrote to BoS in response to a letter regarding possession proceedings but no response was received.

Following Mr and Mrs J's formal complaint, BoS told them that the sale was declined because the option agreement meant that there was some uncertainty as to whether a sale would actually complete at a time when their account was significantly in arrears and they were in dispute over the validity of personal guarantees relating to their business borrowing. BoS rejected the main part of their complaint as it said it was justified in declining the request to sell with an option agreement. It did, however, accept that it had been at fault because it hadn't given Mr and Mrs J reasons for the decline and offered to refund six months of interest onto the account in recognition of its mistake. It also apologised for failing to respond to Mr and Mrs J's letter which was due to mis-filing.

In relation to the personal guarantee, BoS later agreed that the position was ambiguous and therefore agreed to release Mr and Mrs J from the guarantees in support of the company indebtedness and told them it wouldn't pursue them for any further recovery under those obligations.

Mr and Mrs J didn't accept BoS's response to their complaint about the failure to agree to the sale of their property and brought their complaint to this service. The adjudicator was of the view that BoS's response and proposed redress was appropriate in the circumstances as she believed it was reasonable for BoS to reject the proposed sale in the exercise of its commercial judgment. Mr and Mrs J disagreed and asked for the complaint to be reviewed by an ombudsman.

I issued two provisional decisions in this complaint, the first indicating that I was minded to uphold the complaint but was not yet decided on the appropriate redress. The second outlined proposed redress following submissions from BoS and Mr and Mrs J.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Having carefully reviewed the submissions of both parties in response to my provisional decisions, I am still minded to uphold this complaint in full for the reasons given in my first provisional decision.

unreasonable to decline sale

I find that BoS's decision to decline the sale of the property was unreasonable. The property had been on the market for a long period before the offer was received and there was evidence to show that the price offered was reasonable. A sale at that price would have more than covered the outstanding debt on the residential mortgage. It seems likely that the sale would have gone through and, in any event, the option payment could have allowed Mr and Mrs J to service the mortgage in the meantime. BoS's security wasn't threatened by the option agreement, the Bank wouldn't have been bound by it and could have commenced repossession proceedings at the same time in case the sale fell through. I therefore conclude that the refusal to agree to the sale under the option agreement made Mr and Mrs J's situation more uncertain and was more likely to increase their level of arrears than a prompt agreement to the sale.

Mr and Mrs J had accepted that the dispute about the personal guarantees over their business debt could continue to be discussed during the option agreement period. The alternative of selling the property following repossession would have been unlikely to achieve a similar amount for the property thus reducing the value of any personal guarantee for the business indebtedness. BoS later accepted that the situation regarding the personal guarantees was so ambiguous that it released Mr and Mrs J from them anyway. I therefore believe that this wasn't a reasonable justification for refusing to allow the sale.

my second provisional decision

I considered submissions from Mr and Mrs J and BoS about redress and outlined my conclusions in a second provisional decision. Mr and Mrs J responded to my provisional decision arguing that the compensation proposed wasn't adequate for a number of reasons, in particular because it didn't include the lawyers' fees they had incurred which would have been covered by their prospective buyer, because they felt that the sale was almost certain and this should be reflected in the compensation of personal expenses and because they didn't feel that the distress and inconvenience award suggested adequately compensated them.

I have carefully reviewed my findings in light of Mr and Mrs J's submissions. I agree that the lawyers' fees should be included in their expenses for the purposes of calculation of compensation. I still believe that compensation based on a proportion of 75% is appropriate in relation to their other expenses and the difference between the earlier offer and their current offer. This is because the 75% reflects the element of chance associated with any property sale and, if the sale had fallen through for any other reason, they would still have experienced those expenses and that difference in sale price.

I therefore find that BoS should compensate Mr and Mrs J as follows:

loss of chance

The redress that BoS should provide to Mr and Mrs J should compensate them for the loss of a chance to sell their property at £1.2 million in 2012. This means that an assessment needs to be made of the likelihood of the sale going through in order to assess the proportion of BoS's responsibility for the reasonably foreseeable consequences of its refusal to allow the sale to go ahead.

It is difficult to say with any certainty whether or not the sale would have gone through. Property transactions are always uncertain and this one was dependent on planning permission and the agreement of second and third chargees. Mr and Mrs J have provided evidence to show that it's likely that planning permission would have been granted and that the second and third chargees would probably not have objected to the sale. I believe therefore that BoS's offer based on a 75% probability that the sale would have gone ahead is a fair one.

effective dates

I consider that the appropriate date for calculating redress related to interest and expenses should be 30 September 2012.

As Mr and Mrs J would have received a £10,000 deposit I consider that the element of the proposed redress which concerns the difference between mortgage payments and the deposit should be calculated from 31 March 2012 until 30 September 2012.

interest

If the sale of the property had gone ahead for £1.2 million in 2012 there would have been no further interest relating to the first charge after the sale completed in September 2012. From that date, it is likely that the amount of the second charge would have been reduced by £363,435. Mr and Mrs J would also have had the benefit of the £10,000 deposit from March 2012. I therefore find that the proposed offer adequately compensates the loss of opportunity to reduce interest payments on Mr and Mrs J's debt.

The surplus from the proposed sale of the property wouldn't have been enough to pay off any part of the third charge and therefore I don't think it's appropriate to consider any redress related to interest on the third charge.

expenses

Because Mr and Mrs J's property is large and costly to maintain, BoS has offered to compensate them for reasonable expenses incurred in relation to the property. In my view, the £615 per month estimated by Mr and Mrs J as the additional expenses associated with the property is justified in this context. In order to live in the property and prevent degradation of the property, I believe that those additional regular expenses could have been expected as a consequence of refusing to allow the sale of the property. I therefore find that BoS should compensate them with 75% of those expenses to reflect the element of uncertainty regarding the sale – if the sale hadn't gone through, Mr and Mrs J would still have had to cover those expenses. Mr and Mrs J have also mentioned the cost of tree felling but, in my view, that expense, although related to the property, couldn't have been reasonably foreseen and therefore I don't propose to order compensation for that.

Had the option agreement been allowed to go ahead, Mr and Mrs J's solicitors' fees in relation to the option would have been covered by the buyer whether or not the sale went ahead. I therefore consider that BoS should compensate Mr and Mrs J in full for those expenses.

sale of the property

I understand that the property hasn't been quick to sell. Mr and Mrs J have now indicated that they have an offer for the house of £1.17 million. If this sale goes through, they would effectively get £30,000 less than they would probably have had in 2012. As it appears that the offer in 2012 was a particularly good one in the context of the property market for this type of house at that time, I consider it reasonably foreseeable that the property would eventually sell for a lower price.

In my view, Mr and Mrs J's acceptance of this current offer draws a line under the uncertainty of future offers. Although there is no certainty that the sale will be successful, I consider that they are now in a position equivalent to their situation in early 2012. I therefore find that BoS should compensate Mr and Mrs J for 75% of the difference between the current offer and the 2012 offer amounting to £22,500.

future uncertainty

It is difficult to know when the sale of the property will complete if it goes ahead. In the circumstances I think that it is important to establish a degree of certainty in the redress and to allow a short grace period for the sale of the house to be resolved. I therefore find that the redress from BoS should be calculated to apply to interest and expenses which accrue over a grace period of six months from the date of the final decision or until completion of the sale of the property if that is earlier. This reflects the estimated six month period for completion on the original offer in 2012.

distress and inconvenience

Mr and Mrs J have told me about the distress they have suffered as a result of BoS' actions. They had hoped to resolve a large part of their financial difficulties through the sale of their property in 2012. They planned to downsize in order to reduce their outgoings and their debts. As a result of their situation, they have told me they have had to borrow from relatives to meet their living costs in a context where they had no idea when they may be able to resolve their problems.

I appreciate that BoS is now making serious efforts to offer an appropriate redress package. In my view, an essential part of that redress is compensation for the distress and inconvenience suffered by Mr and Mrs J as well as redress for their financial losses. I consider that the uncertainty they have suffered over their future for the last two years has caused them an exceptional level of distress and inconvenience and therefore I would propose an award of £1,000 for the distress and inconvenience caused.

Mr and Mrs J have suggested that a figure of £50,000 more appropriately reflects the degree of distress and inconvenience that they have suffered. This amount would be a truly extraordinary award in the context of compensation that this service orders for distress and inconvenience.

While I appreciate that Mr and Mrs J have suffered both distress and inconvenience as a consequence of BoS's refusal to allow them to sell their property, in the context of the Financial Ombudsman Service, £1,000 is a substantial award. I also note that this complaint is set against the backdrop of Mr and Mrs J's wider financial difficulties which are inherently distressing.

my final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

It is my final decision that this complaint is upheld in full. My decision is that Bank of Scotland plc must:

- Refund £4,429 being the difference between the non-refundable £10,000 deposit offered and the mortgage payments made between March and September 2012;
- Recalculate the mortgage to reflect a refund of 75% of the interest payable on the mortgage between 30 September 2012 and the date of completion of sale or six months after the issue of this final decision (whichever is earlier);
- Refund 75% of the interest accrued on £363,435 of the second charge from 30 September 2012 until the date of completion of sale or six months after the issue of this final decision (whichever is earlier);
- Pay Mr and Mrs J £461.25 per month towards the expenses they have incurred between 30 September 2012 and the date of completion of sale or six months after the issue of this final decision (whichever is earlier);
- Pay Mr and Mrs J £1,000 for the distress and inconvenience they have suffered as a result of its actions; and
- Pay Mr and Mrs J £22,500 representing 75% of the difference between the offer they received in March 2012 and the offer they have received in April 2014

up to a maximum of £150,000. If the amount produced by this calculation exceeds £150,000, I recommend that Bank of Scotland should refund Mr and Mrs J the balance.

This recommendation is not part of my determination or award. It does not bind Bank of Scotland plc. It is unlikely that Mr and Mrs J can accept my decision and go to court to ask for the balance. Mr and Mrs J may want to consider getting independent legal advice before deciding whether to accept this decision.

In addition to the above, I order Bank of Scotland plc to pay Mr and Mrs J the solicitors' fees incurred in relation to the option payment plus interest at 8% simple from the date the fees were paid until the date of settlement.

**Susie Alegre
ombudsman**